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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 141.

THE CONFEDERATED BANDS OF UTE INDIANS, *Petitioners*,

v.

THE UNITED STATES.

On Writ of Certiorari to the Court of Claims.

REPLY BRIEF OF PETITIONERS.

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REPLY BRIEF OF PETITIONERS.

I. The Executive Order of 1875.—Respondent purports to misunderstand the basis of petitioners' case, pretending that it depends upon the efficacy of the Executive Order of 1875 to vest in petitioners a compensable interest in the lands which it covered. (Respt's. Brf. p. 19.) But the case petitioners have presented, irrespective of the efficacy *vel non* of the Executive Order of 1875, is that the United States agreed in 1880 for a valuable *quid pro quo* to hold the proceeds of these Executive-order lands (together with the balance of petitioners' reservation as it existed in 1880) for the benefit of petitioners, but thereafter, in derogation of its trust, by the Executive Order of 1882, took and converted these lands to its own proprietary use.

Apparently, respondent has placed the emphasis which it does upon the Executive order of 1875 in an attempt to confuse the issue by importing into the case at this stage

much provoking matter, not in the record here, nor in the record of the court below,[1] which is irrelevant to the issues upon which this Court granted the writ of certiorari or upon which petitioners have presented their case in their brief. These materials relate to a controversy over the location of a survey made in 1875 by one J. W. Miller. Respondent in one part of its brief contends that Miller did not pretend to run the north line of the reservation at all, (Respdt's Brf. pp. 8-9) in another that he ran the north line of the reservation south of the point where it ought to have been run. (Respdt's Brf. p. 10) But the determination of the propriety of the Miller survey is entirely irrelevant to the case presented below and in this Court, which is based on the taking in 1882 of lands which respondent agreed to sell for petitioners' account by the agreement of June 15, 1880. The importance of the 1875 Executive order consists, not in the fact that it established an indefeasible title in petitioners, but in the fact that the land covered by the order was a part of petitioners' "present reservation" by the Agreement of 1880, which respondent agreed to hold in trust for sale for petitioners' benefit. By 1880, the Government had formally ruled, despite insistence that the erroneous survey had negatived the Executive order, that "The question of the right of [petitioners] occupancy is not affected by the accuracy of Mr. James W. Miller's sur-

[1] The entire statement of facts of respondent is suffused with statements about the erroneous survey of J. W. Miller. (Respdt's. Brf. pp. 7-13.) Footnote 3 on page 8 of respondent's brief, for instance, refers to such things as the field notes of one Darling's and Miller's surveys and their instructions (Respdt's. Brf. pp. 58-70)—entirely *dehors* the record here and in the court below. Likewise, none of the material added as an appendix to respondent's brief (pp. 58-70), including the map either prepared for or by counsel for respondent was a part of the record below. True there was evidence before the court below as to whether the Miller survey was, or was not, correct, but the court below paid no attention to the point—apparently for the obvious reason that it is immaterial with respect to the scope to be accorded the agreement of 1880. In any event, the new materials added as an appendix to respondent's brief, are brought to the attention of the Court now on the appeal as an afterthought.

vey" (S. Exec. Doc. No. 29, 46th Cong., 2d Sess., p. 42, quoted at R. 32), and that "all lands withdrawn by said executive order are reserved as Indian lands, and are not, therefore, regarded as a part of the public domain for any purpose whatever, and that white settlers thereon are trespassers, and will be removed by the government, with the aid of the military, if necessary." (R. 35; S. Exec. Doc. No. 29, 46th Cong., 2d Sess., p. 44.)

Whether or not there was an error in the survey of the north boundary is wholly immaterial. Whether or not the Executive order itself conveyed, in the circumstances, an unimpeachable title to petitioners is irrelevant. The fact is that in any view which might have been taken by the parties at the time, petitioners had an interest in these lands, which they could and did "release" to respondent.

The attempt to import into the case in this Court a new ground of defense—available and known to respondent below—should fail. It does not meet the issue upon which the case has been presented (see paragraphs 7-8 inclusive of petitioners petition in the court below, R. 3); it undertakes to make petitioners' position appear quite different from what it actually is; and it is an attempt to change in this Court the theory upon which the case was tried and disposed of below. This is improper. *New York, L. E. & W. R. Co.* v. *Estill*, 147 U. S. 591, 614-615; *Virginian R. Co.* v. *Mullens*, 271 U. S. 220, 227-228.

II. The Act of 1880. Respondent's contention that respondent by the Act of 1880 did not commit itself to compensate petitioners for the Executive-order land ignores all provisions of the Act of 1880, 21 Stat. 199, except Section 3.[2] Yet it should be noted that Section 3 is not the granting clause of the Agreement of 1880, for Section 3 merely provides that "all the lands not so allotted, the title

[2] Thus respondent in setting out in its appendix the pertinent provisions of the 1880 Act (respondent's brief 56, 57) prints only Section 3 of that particular act. The entire act is printed as a separate appendix to this brief.

to which is, by *the said agreement* (meaning the preliminary agreement) * * *, and this acceptance of the United States, *released* and *conveyed* to the United States, shall be held and deemed to be public lands of the United States and subject to disposal under the laws providing for the disposal of the public lands," etc. When we refer back to the preliminary agreement to see what lands were released and conveyed to the United States, we find that in the second paragraph the chiefs and headmen agreed to use their best endeavors with their people "to procure their consent to cede to the United States *all the territory* of the *present Ute Reservation* in Colorado." This consent was obtained when the Act of June 15, 1880, was ratified by three-fourths of petitioners.

The final agreement therefore consisted of a promise on the part of petitioners to release and convey "all the territory" of their then "present reservation" to respondent, and a correlative promise on the part of respondent to sell for petitioners' account all of petitioners' land, including the Executive-order strip. This is further substantiated by the preamble of the final agreement, which recites that the Ute Indians have submitted to the Secretary of the Interior "an agreement for the sale to the United States of their *present reservation* in the State of Colorado." By thus relating Section 3 to the other provisions of the agreement, it is apparent that all petitioners' lands were to be released and conveyed. And unless Section 3 is thus related to the other provisions of the agreement, it becomes necessary for the Court to ignore the other provisions of the agreement, which is not proper statutory construction. It is therefore obvious that the use of the word "title" in Section 3 of the final statute-agreement was not intended to cut down on the area of the land to be ceded by the preliminary agreement.

The fallacy of the opinion below is its naked assumption that the word "title" meant some kind of a fee.[3] But this

[3] The only support respondent offers for this view is its bare assertion "Words could hardly be clearer."

was not true with respect even to the land petitioners had received under the Treaty of 1868. The pertinent part of Article II of the treaty reads: "The United States agree that the following district of country * * * is hereby, set apart for the absolute and undisturbed use and occupation of the Indians herein named * * *." Petitioners had, therefore, only the usual "Indian title" to their reservation—not a fee simple. *United States* v. *Alcea Band of Tillamooks*, No. 26, O. T. 1946, decided November 25, 1946, pamph. op. p. 6. Since the bulk of the territory to be released under the 1880 act was held by petitioners under a title that was far from being an absolute legal title, this fact in itself would negative an intention of Congress to limit the definition of the term "title" to a fee estate. Congress could not be supposed to have used that term to include the inferior estate received under the Treaty of 1868 and at the same time to exclude the inferior estate received under the Executive order of 1875. The word "title" has always been a word of variable meaning and is often, as here, used to connote whatever interest the grantor, releasor or claimant possesses. *Roberts* v. *Wentworth* (1849), 59 Mass. 192, 193; *Mulkins* v. *Snow* (1919), 175 N. Y. S. 41, 44, 106 Misc. 556, 560; *Irving* v. *Brownell* (1849), 11 Ill. 402, 415; *Skelly Oil Co.* v. *Kelly* (1931), 134 Kans. 176-179, 5 P. (2d) 823, 824; *Christy* v. *Nicholson* (1892), 48 Kans. 177, 29 Pac. 398; *Haynsworth* v. *Bischoff* (1873), 6 S. C. (6 Rich.) 159, 167. In the first of these cases, the Supreme Judicial Court of Massachusetts said:

> "A party may have a title to property although he is not the absolute owner. If he has the actual or constructive possession of property or the right of possession, he has a title thereto, although another party may be the owner."

Thus, too, it has been held that where jurisdiction has been granted to determine actions between individual Indians as to "*title* to real estate on [their] reservations," the word "title" embraced the "limited right of occupancy which the

individual Indian" acquired by allotment or by appropriation, cultivation or improvement. *Mulkins* v. *Snow, supra.*

In *Irving* v. *Brownell, supra,* the Supreme Court of Illinois in determining the nature of title that had to be proved under a statute pertaining to delinquent tax sales, said:

> "The word 'title' as used in the act of 1835, should not, therefore, be construed to mean a perfect title, nor is the word, in its ordinary acceptation, understood in such a restricted sense. There are perfect titles and apparent or imperfect titles. Even a naked possession constitutes a species of title, though it be of the lowest degree. The meaning of the word is, therefore, to be ascertained from the connection in which it is used, * * *" (p. 316).

Just so with the statute here involved. Only by interpreting the word "title" in the Act of 1880 to include the right of possession, which petitioners had, can § 3 be made consistent and harmonious with the rest of the statute. "Release" is the traditional language of quitclaim, which is always adequate consideration for a conveyance. It matters not whether petitioners' claim was a compensable interest of the type referred to some 62 years later in *Sioux Tribe* v. *United States, supra.* The point that respondent completely overlooks is that a release of a claim to possession is the giving up of a claim to title and is every bit as good a consideration for an agreement to pay as is a fee simple or warranted title. As stated by the Court of Claims some 36 years ago in litigation between the same parties and in answer to a similar argument of respondent (*Ute Indians* v. *United States,* 45 C. Cls. 440, 466):

> "Even if we may admit that they [the Utes] had no valid title to any lands, yet they *claimed* some title and honestly claimed it, and the yielding of such a claim to a party who wishes to purchase it is a good consideration."

And as stated by this Court in *Sykes* v. *Chadwick,* 18 Wall. 141):

> "If any release [and that is what petitioners here gave] is deemed requisite to confirm the title of lands with which one has been connected, though by a proper construction of the law he has no interest in them whatever, still such release will be a good consideration for a promise or for the payment of money."

Moreover, even this Court at the time of the Agreement of 1880 did not consider that an Executive order would not convey the same title as any treaty or act of Congress, for ten years later this Court in *Spaulding* v. *Chandler*, 160. U. S. 394, 403, expressed the opinion that "When Indian reservations were created, either by treaty or executive order, the Indians held the land by the same character of title, to wit, the right to possess and occupy the lands for the uses and purposes designated."

Respondent argues that the fact that the word "title" was used in three prior treaties with the Utes (Respt's. brf. p. 35) creates an inference that the term must have been understood by them as meaning a technical compensable interest when they signed the 1880 Agreement. But by this argument respondent is hoist with its own petard, for an examination of the use of the word "title" in those three treaties indicates that in each instance, the word was used in a different context, none of which referred to a fee title.[4]

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[4] Article II of the treaty of October 7, 1868, (13 Stat. 673) provided that petitioners agreed to "cede, convey, and relinquish all claim, right, title, and interest in and to any and all of their lands within the territory of the United States" except the prescribed reservations. Here the Indians were releasing the species of title, if any, which they had held under the Mexican Government.

In Article III of the treaty of March 2, 1868, (15 Stat. 619) petitioners agreed to "relinquish all claims and rights in and to any portion of the United States or territories" except the prescribed reservation. In spite of the fact that this was a much broader release, the treaty makes no mention of the word "title". In Article VII, however, the president was authorized to "fix the character of the title held by each [Indian]". Whereas, in the treaty of 1863, "title" meant the communal tribal interest in lands, here it referred to an individual estate of undetermined quality.

The Act of April 29, 1874, (18 Stat. 36) ratifying an agreement between the parties required petitioners (Article I) to "relin-

Respondent's argument that because the Indians were told by the agent (Respt's. Brf. pp. 24-5) that they did not own the land on Douglass Creek in Wyoming, or in North Park, Colorado, or in Bear River Valley (R. 15) it follows that the Indians were never given to understand that they owned the Executive-order lands completely overlooks the fact that after promulgating the Executive order the Commissioner of Indian Affairs wrote to Agent Danforth stating that the Executive order "will enable you to assure the Indians of the exact location of the limits of their reservation as enlarged." (R. 20) With this letter the Commissioner enclosed a portion of a map of Colorado showing the portion withdrawn as the addition to the Indian reserve. (R. 20.) Since the agent was clamoring for action from Washington there is no doubt, contrary to what he had previously told them with respect to the lands farther north, that he followed instructions and notified the Indians of the addition to their reservation. The very fact that petitioners claimed and ordered whites off land in Douglass Creek in Wyoming, and in North Park and the Bear River Valley in Colorado, all of which are north of, and which they could reach only by crossing the Executive-order lands, shows that they certainly assumed that they owned the Executive-order lands.

The fact that the Executive-order addition is not mentioned in the legislative history of the 1880 Act proves, rather than disproves, that it was intended to be released and conveyed by the Indians. The parties were dealing with respect to the total lands that the Indians then possessed. The purpose of the treaty was to remove the White River Band, who lived in the northern part of the existing reservation, entirely out of the State of Colorado to land in

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quish to the United States all right, title, and claim and interest in" the described portion of the reservation. But the very next article of the agreement provided that "The United States shall permit the Ute Indians to hunt upon said lands so long as the game lasts * * *". Under the authorities cited above even this constituted a grant of a species of "title."

Utah, the Uncompahgres to land farther west, and the Southern Utes to land in Southern Colorado where they were to be given individual allotments. That purpose of the agreement would not have been accomplished if the lands embraced within the Executive order were still to continue in Indian possession and not be released to the United States. The only clear inference from the fact that the Executive-order lands are not mentioned in the legislative history is that they were to be conveyed along with the balance of the Indian land. If in the historical setting of this agreement the United States did not intend to pay for these lands, its silence amounted to a fraud. (Petrs.' Brf. pp. 21-22.) It cannot possibly be that the Indians had a right to continue possession of the Executive-order lands, notwithstanding the Agreement of 1880. This was recognized by the court below in the opinion of Judge Whitaker, which opinion respondent now characterizes as "mere speculations." While it is to be admitted that the opinions of the court below cannot be referred to for the purpose of "eking out, controlling or modifying the scope of the findings" of fact, it is settled that the opinion may be referred to for the purpose of clarifying the meaning of findings made by the court, *American Propeller & Mfg. Co.* v. *United States*, 300 U. S. 475, Judge Whitaker's opinion properly shows the understanding the court below had of its own findings.

Respondent attempts to lift itself by its own boot straps by referring to its taking of the lands in 1882 as an administrative interpretation that it had a right to do so without compensating the Indians for the land embraced within the Executive order. There is nothing in the history of the Executive order of 1882 to indicate that it was a studied interpretation of the right of the government to take back the lands. There is no evidence of any kind that it was ever passed upon by any legal officer of the government. If the taking of lands by the government could, as respondent here argues, be held *ipso facto* to be an administrative interpretation of the right of the government to take such lands, it would be impossible for any Indian Tribe to ever recover for the taking of lands. Respondent cannot exalt its taking

in derogation of its trust into an administrative construction showing that petitioners had no right. The unilateral appropriation of the land in question in 1882 does not change the meaning of the Act of 1880, any more than the conduct of the Government changed the rights of other Indian Tribes. (*United States v. Creek Nation*, 295 U. S. 103, 110; *Shoshone Tribe* v. *United States*, 299 U. S. 476, 496, 498; *United States* v. *Klamath & Moadoc Tribes*, 304 U. S. 119, 123; *United States* v. *Alcea Band of Tillamooks, et al.*, No. 26, O. T. 1946, decided November 25, 1946.)

III. Res judicata.—Respondent, to support the judgment below, relies upon a ground of decision not passed upon by that court—nor, indeed, properly before it or before this Court. Respondent says that in a suit entitled *Ute Indians* v. *United States*, 45 C. Cls. 440, 46 C. Cls. 225, brought pursuant to the Indian Appropriation Act of March 3, 1909, c. 263, 35 Stat. 781, 788-9, petitioners recovered for all sales and public reservations of the land under the Agreement of 1880 up to June 30, 1910, and that although petitioners received in that case nothing for the Executive-order lands taken in 1882, this claim is *res judicata*.

The record does not support the assertion that the prior case could be or is *res judicata* of the present action. The jurisdictional act under which the present action was brought, Act of June 28, 1938, c. 776, 52 Stat. 1209, as amended specifically provides (§ 5):[5]

> "No payment or payments which have been made by the United States *upon or in satisfaction* of any claim or claims asserted in any suit brought hereunder or expended for any of the aforesaid bands of Ute Indians or members thereof shall apply as an estoppel against any suit brought hereunder, but there shall be set off against any recovery obtained by any band of said Indians hereunder, any payment made by the United States on any claim asserted * * *." [Italics added]

[5] Respondent entirely ignores this provision of the jurisdictional act under which the present suit is brought.

The jurisdictional statute thus prohibits dismissing petitioners' case on the ground of *res judicata*, although it permits respondent to set off any payments already made.

But if this were not so, still respondent failed to plead in the Court below the prior petition in and judgment of the Court of Claims, as is required for a plea of *res judicata* to be sustained. *Bryar* v. *Campbell*, 177 U. S. 649, 654-655. The matter not having been pleaded below, and the prior petition in and judgment of the court not having been made a part of the record either below or in this Court, and not being here for the examination of this Court, the belated contention of respondent as to *res judicata* is clearly unwarranted.

But even if respondent could here avail itself of the defense of *res judicata*, respondent cannot prevail under either of the two branches of that doctrine (which are confused in respondent's brief). The first branch, which is really what respondent urges be applied here, is that a prior suit on the same claim is an absolute bar to a subsequent suit even though certain grounds of recovery or defense were not even raised in the first suit; the second branch is that "where the second action * * * is upon a different claim * * * the judgment in the prior action operates as an estoppel * * * as to those matters" actually controverted and adjudicated.[6] *Cromwell* v. *County of Sac*, 94

[6] The classic statement of this Court with respect to the two branches of the doctrine of *res judicata* was made by Mr. Justice Field in *Cromwell* v. *County of Sac*, 94 U. S. 351, 352-353, as follows:

> "* * * In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with

U. S. 351, 352; *Mercoid Corp.* v. *Mid-Continent Inv. Co.*, 320 U. S. 661, 671; *Federal Tr. Comm.* v. *Raladam Co.*, 316 U. S. 149, 152-3; *Tait* v. *Western Md. Ry. Co.*, 289 U. S. 620, 623; *Larsen* v. *Northland Transp. Co.*, 292 U. S. 20, 25. An examination of the limited jurisdictional act of March 3, 1909, clearly reveals that only two claims could be asserted thereunder: (1) a claim "on the rights of said Indians under" the Act of June 15, 1880, which meant an accounting for all lands sold under said act, and (2) a claim for the value of lands ceded by petitioners which had been taken and set apart as public reservations.

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them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defences actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defences were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defences never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defence actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action, to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action. * * *"

That act did not authorize a suit for the 1882 Executive-order taking, which was not a setting apart as a public reservation, but merely a restoration to the public domain. Under the authorities, therefore, the prior judgment cannot be set up as an absolute bar to the new claim here asserted, which is based exclusively on the Executive-order taking of 1882.

The question, therefore, reduces itself to that of whether, notwithstanding the limited language of the prior jurisdictional act, the claim here asserted was there actually litigated either *in toto* or *pro tanto*. An examination of the record in that case will reveal that the claims adjudicated, as authorized by the act, were confined to (1) an accounting for the proceeds of lands sold, and (2) a claim for the value of lands taken for public reservations, all of which were forest reserves. *Ute Indians* v. *United States*, Supra. As stated by court below in its findings, "the plaintiffs [petitioners] recovered a judgment for the proceeds of the cash sales of the land sold, plus the value of land reserved for public purposes, less offsets and deductions. None of these lands lay north of the true boundary of the reservation as described in the treaty of March 2, 1868 [*i. e.*, they did not include either the proceeds or the value of any lands within the Executive-order reservation] (15 Stat. 619). A supplemental judgment included additional sums received by the defendant [respondent] up to July 1, 1910." (Finding 17, R. 24.) Accordingly, even on the second branch of the doctrine of *res judicata* (estoppel by judgment) there can be no estoppel either *in toto* or *pro tanto*. *Cromwell* v. *County of Sac.*, *supra*.

Furthermore, if, as contended, respondent could have been made, in the prior suit, to account for the lands here in question, then respondent by its conduct in that case is estopped now to plead *res judicata*. There, the court called on the Secretary of the Interior to account for "the number of acres of land sold or disposed of by the United States from lands ceded under the agreement of June 15, 1880" (page 347 of record in *Ute Indians* v. *United States*, No.

30360 in the Court of Claims). In rendering that account, the Secretary did not report any sales made of land in the Executive-order strip (Finding 17, R. 23-4). Respondent did not therefor disclose any facts to the court upon which it could have made an adjudication as to the Executive-order lands. Further, respondent made no disclosure to the court that it had not accounted for lands within the Executive-order strip.[7] It would follow, therefore, that respondent, as trustee, on being required to account, falsely failed to account for the lands now in question—then asserts its own failure to account as *res judicata* which equity will not condone. The jurisdictional act here provides that the court shall apply against respondent "the same principles of law that would be applied against an ordinary fiduciary" (§ 3). And a trustee cannot in equity garner unto itself the property of its ward through the device of pleading a judgment upon its earlier wrongful accounting as *res judicata*. *Meredith* v. *First Tr. Co. of Albany* (1940), 23 N. Y. S. (2d) 953, 956, 260 App. Div. 517; *Roberts* v. *Michigan Tr. Co.* (1935), 273 Mich. 91, 121, 262 N. W. 744; *In re Evans' Est.* (1944), 62 Cal. App. (2d) 249, 257, 144 P. (2d) 625, 629. *Cf. Drummond* v. *United States*, 324 U. S. 316, 317-8.

Finally, even if respondent were correct that the 1910 judgment is conclusive upon petitioners since the matter might have been litigated, still it would be conclusive only as to sales of land made prior to June 30, 1910; for the accounting was brought down only to that date. (Finding 17, R. 24.) Petitioners would, therefore, still remain entitled to an accounting for all sales and disposals of the Executive-order lands made since 1910 and for the taking of the remainder of the lands by § 6 of the jurisdictional

[7] If, as we do not believe, respondent is entitled, without even putting in evidence the record of the prior case, to have this point of *res judicata* considered, then certainly petitioners are entitled to disclose what the record contains. This very situation, however, shows that, absent pleading and proof, this Court cannot here know or hold that the prior suit was *res judicata* of the present action.

act, Act of June 28, 1938 (c. 776, 52 Stat. 1209, § 6, as amended by Act of July 15, 1941, c. 299, 55 Stat. 593). *Confederated Bands of Ute Indians* v. *United States*, 100 C. Cls. 413. Consequently, the 1910 judgment and the doctrine of *res judicata* cannot possibly sustain the judgment below in the present case.

CONCLUSION.

The judgment below should be reversed.

Respectfully submitted,

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